9-3-2008

Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho Appellant's Brief Dckt. 35269

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

OREGON MUTUAL INSURANCE COMPANY, an Oregon corporation, individually and on behalf of its insureds Dale and Kelly Bramlette, and Tananda Bramlette,

Plaintiff-Appellant,

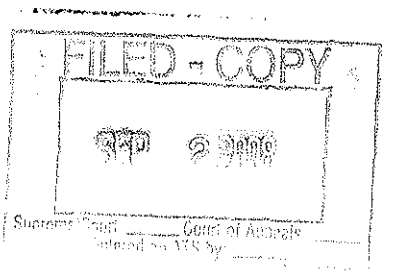
vs.

FARM BUREAU MUTUAL INSURANCE COMPANY OF IDAHO, an Idaho corporation, and WESTERN COMMUNITY INSURANCE COMPANY, an Idaho corporation, and CHRIS KISER, an individual, and LOWELL THOMPSON, an individual,

Defendants-Respondents.

Supreme Court Docket No. 35269

Ada County Case No. CV OC 0621200



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

The dispute in this case centers around whether or not Defendant Lowell Thompson had "expressed" or "implied" permission to drive a Toyota Celica owned by Kelly and Tananda Bramlette, and if so, the scope of any such permission. While driving the vehicle, Mr. Thompson was involved in an accident with Defendant Chris Kiser on January 21, 2006.[1] Plaintiff/Appellant Oregon Mutual Insurance Company, individually and on behalf of its insured, Dale and Kelly Bramlette, and Tananda Bramlette ("Oregon Mutual"), brought a declaratory action against the Defendants/Appellees to establish its rights and obligations pursuant to the owners' automobile insurance policy, and to obtain a ruling as to whether it was required to provide a defense, indemnify or otherwise provide coverage pursuant to Idaho's imputed negligence statute, I.C. §49-2417. That statute provides for owner liability for the negligent operation of the vehicle by any person operating the vehicle with the permission, expressed or implied, of the owner.

B. Course of Proceedings.

On November 13, 2006, Oregon Mutual filed its Complaint for Declaratory Judgment in Ada County, Idaho District Court against Lowell Thompson (driver of owners' vehicle), Chris Kiser (party injured in accident), Farm Bureau Mutual Insurance Company of Idaho and Western

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[1] Mr. Kiser was insured for the loss by Defendants Farm Bureau Mutual Insurance Company of Idaho and Western Community Insurance Company. *(R., pp.99-100.)*

Community Insurance Company (insurers of Mr. Kiser). *(R., p.7.)*

Defendant Thompson failed to file an answer to the action, and on January 3, 2007, the District Court entered a Default Judgment.[2] *(R., p.3.)* The District Court refused to include the following language offered by Appellant into the Default Judgment:

> b. Defendant Chris Kiser does not have any claims against insured Dale Bramlette, Kelly Bramlette, and Tananda Bramlette because Defendant Lowell Thompson did not have permission, express or implied, to drive the vehicle.

Thus, the law of the case was that the Judgment against Thompson had no effect on the rights of the other litigants. Although Defendants Kiser and his insurers filed an Answer to the Complaint prior to entry of the Default Judgment, they neither objected to nor moved to set aside the Default Judgment.

Oregon Mutual subsequently filed a motion for summary judgment based upon its belief that in the alternative to the Default Judgment, undisputed facts showed Thompson was not a permissive driver. The District Court denied the motion ruling that the deposition testimony of Mr. Thompson created a genuine issue of material fact regarding coverage. *(R., p.143.)* The District Court further held that Mr. Kiser's insurers were not collaterally estopped by the Default Judgment from raising the issue of coverage because they never had the opportunity to litigate the issue. *(Id.)*

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[2] In the Default Judgment, the District Court ordered, adjudged and decreed that "Defendant Lowell Thompson did not have permission, express or implied, to drive the vehicle, and as such, the Policy does not require Oregon Mutual to defend, indemnify or otherwise provide coverage for Defendant Lowell Thompson for all claims arising out of the January 21, 2006 accident." The District Court refused to sign off on proposed language in the Default Judgment which would have precluded any claims by Mr. Kiser against the Bramlettes.

As a result of the Court's ruling on the estoppel issue, a bench trial was held on January 7, 2008 before the Honorable Darla Williamson, Ada County District Court Judge, solely on the issue of whether Mr. Thompson was a permissive driver. *(R., p.146,154.)* Kelly Bramlette and her daughter, Tananda Bramlette, personally appeared and testified at trial on behalf of Oregon Mutual. *(Tr., pp.8,36.)* Officer Jim Brown and Chris Kiser personally appeared and testified on behalf of Defendants. *(Tr., pp.121,133.)* Although subpoenaed, Mr. Thompson failed to appear at trial, and the District Court reviewed and considered his March 15, 2007 deposition testimony, pursuant to Rule 32(a), I.R.C.P. *(Tr., pp.137-142.)* The parties submitted written closing arguments to the District Court. *(R., pp.158,175,183.)*

On February 26, 2008, the District Court issued its Trial Decision, and concluded that at the time of the accident, Mr. Thompson was driving the owners' vehicle with the permission[3] of Tananda Bramlette. *(R., p.192.)* Judgment was entered by the District Court on April 9, 2008. *(R., p.199.)* The District Court did not address its conflicting judgments in its opinion. Oregon Mutual now appeals the District Court's Trial Decision.

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[3] In its analysis, the district court stated that "[a]lthough co-owner Kelly Bramlette never gave permission, express or implied, to Lowell to drive the Celica, the court finds the same is not true of co-owner Tananda." *(R. p.197, L.13.)* The Court subsequently concluded that at the time of the accident, Tanada granted Mr. Thompson permission to drive the vehicle, without discussing the extent of the permission granted, and without clarifying whether or not the permission was expressed or implied. *(Id., p.24.)*

C. Statement of Facts.

On January 21, 2006, at approximately 7:40p.m., Lowell Thompson was driving a Toyota Celica and collided with a vehicle being driven by Defendant Chris Kiser. *(R., p.205, deposition of Lowell Anthony Thompson, dated March 15, 2007, pp.13,14,34,24,44,45.)* At the time of the accident, Kelly Bramlette and her daughter, Tananda Bramlette, were the owners of the Toyota Celica. *(Tr., pp.9,38; R., p.206, Plaintiff's Exhibit 1.)* The Toyota Celica was insured by Oregon Mutual Policy No. IP233432, issued to Dale Bramlette (Tananda's father), and Kelly and Tananda Bramlette were named insureds. *(R., pp.15,16.)* The accident occurred outside of Middleton, Idaho, approximately 30-45 minutes away from Tananda's place of employment. *(Tr., pp.57-60.)*

Tananda first met Mr. Thompson in late September of 2005, and they subsequently developed a romantic relationship and began living together in October of 2005.[4] *(Tr., pp.10,11,39,44.)* Prior to the date of the accident, Tananda permitted Mr. Thomspon to drive her Toyota Celica on only two occasions. *(Tr., pp.39-42.)* One of those occasions was in October of 2005 when she had consumed too much alcohol, and the other occasion was in December of 2005 when she was sick. *(Id.)* Tananda rode as a passenger with Mr. Thompson on both of those occasions.[5] *(Id.)* A couple of days prior to the accident, Kelly Bramlette told Mr. Thompson in

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[4] Tananda and Mr. Thompson lived together from October 5, 2005 through January 21, 2006 at various locations, with the exception of a 3 week period, during which he was detained in Wyoming in connection with an unrelated accident. *(Tr., pp.43-45.)*

[5] Mr. Thompson testified that prior to January 21, 2006, he had never driven Tananda's vehicle. *(R., p.205, deposition of Thompson, pp.10,36,37.)*

person that he was not to drive the Toyota Celica.[6] *(Tr., pp.11-13,25,26.)*

As of January 21, 2006, Tananda was living in Nyssa, Oregon with Mr. Thompson, his friend Jacob, his two brothers, and his father. *(Tr., p.43.)* At that time, the Toyota Celica needed some mechanical attention, and Dale Bramlette arranged for repairs to be made by Al Hall's Tire Center in Garden City, Idaho. *(Tr., pp.46-50; R., p.205, deposition of Thompson, p.7.)* On the afternoon of January 21, 2006, Tananda drove the Toyota Celica to Al Hall's Tire Center, and Mr. Thompson either accompanied her or drove another vehicle to the tire center. *(Tr., pp.52,53; R., p.205, deposition of Thompson, pp.9,10,25,39.)*

When Tananda dropped off her vehicle, she gave the keys to a mechanic at the tire center, and made arrangements for someone at the tire center to pick her up at work after the repairs had been completed. *(Tr., pp.53,56,57,65.)* One of the mechanics drove Tananda to her work place at the Wal-Mart in Garden City, where she was scheduled to work until 8:00p.m. *(Tr., pp.46-47.)* Mr. Thompson was employed at Al Hall's Tire Center at the time, and he remained at that location while the mechanic worked on Tananda's vehicle. *(Tr., pp.66-67; R., p.205, deposition of Thompson, pp.9-11.)*

Tananda did not give Mr. Thompson permission to take the Toyota Celica from the tire center, and she never gave any of the mechanics permission to release her vehicle to Mr. Thompson. *(Tr., p.66; R., p.205, deposition of Thompson, p.52.)* Mr. Thompson knew that he was not supposed

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[6] It is undisputed that at no time did Kelly Bramlette ever give Mr. Thompson expressed or implied permission to drive the Toyota Celica.

to be driving the Toyota Celica, because he had an invalid license, and he was present when Dale Bramlette informed the owner of Al Hall's Tire Center that Mr. Thompson was not to drive that vehicle. *(R., p.205, deposition of Thompson, pp.11,12,43,44.)* It was Mr. Thompson's understanding that another employee was going to pick up Tananda at Wal-Mart when the repairs to her vehicle were completed. *(R., p.205, deposition of Thompson, pp.10,42,43,52.)*

While waiting at the tire center, Mr. Thompson drank beer with the other employees.[7] *(R., p.205, deposition of Thompson, pp.14,15,41.)* After repairs to the vehicle had been completed, Al Hall, the owner of the tire center, handed Mr. Thompson the keys to Tananda's Toyota Celica, and told him to take it to Wal-Mart, and not to do anything stupid. *(R., p.205, deposition of Thompson, pp.11,44.)*

There is a factual dispute regarding what occurred next. Tananda testified at trial that she never received a call from the tire center that her car repairs were completed, and that she never spoke with Mr. Thompson again until after the accident. *(Tr., pp.42,43,56,66,95,96,111.)* Tananda said that she did not give Mr. Thompson permission to drive the Toyota Celica on January 21, 2006. *(Tr., p.43.)* Mr. Thompson testified in his deposition that he drove the Toyota Celica to Wal-Mart just prior to 7:30p.m., and that Tananda was on a break at that time. *(R., p.205, deposition of Thompson, pp.44-45.)* According to Mr. Thompson, Tanada told him to "go right down the street

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[7] Although Mr. Thompson testified that he consumed only one and one-quarter 12-ounce cans of beer while at the tire center, he had a .09 blood alcohol content when his blood was tested at the hospital after the subject accident, and he entered into a plea agreement in connection with a misdemeanor DUI charge. *(R., p.205, deposition of Thompson, pp.14,20,21.)*

and put some gas in it and come right back." *(Id., p.12.)* Mr. Thompson said that Tananda was adamant that he was only to put gas in the vehicle and come right back. *(Id., p.13.)*

Mr. Thompson's intent at that time was to go to the Maverick, which was about one-quarter of a mile away, put gas in the vehicle, and then return to Wal-Mart and wait for Tananda. *(Id., p.46.)* However, after putting gas in the vehicle, Mr. Thompson decided to drive the vehicle to Sand Hollow, Idaho[8], to check on his Mustang[9] which had been abandoned on the side of the road several days earlier. *(Id., pp.12,47,48,49.)*

The accident with Mr. Kiser occurred while Mr. Thompson was in route to Sand Hollow. *(Id., pp.13-14.)* The accident occurred on Highway 44, outside of Middleton, Idaho, approximately 30-45 minutes away from Tananda's place of employment. *(Tr., pp.57-60.)*

Mr. Thompson admitted that he did not follow Tananda's instructions to get gas and return, that he "made a stupid choice in not doing what she told me to do," and that other than using the vehicle to get gas, Tananda did not give him permission, expressed or implied, to use the vehicle on that date. *(Id., pp.48,52.)*

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[8] It takes approximately one hour to drive from Garden City, Idaho to Sand Hollow. *(Tr., p.62.)*

[9] The Mustang was given to Mr. Thompson by a friend in Wyoming, and Mr. Thompson loaned that vehicle to Jacob King, who left it on the side of the road in Sand Hollow after having some type of mechanical difficulties with the vehicle. *(R., p.205, deposition of Thompson, pp.30,31; Tr., p.58.)*

II.

ISSUES PRESENTED ON APPEAL

A. Did the District Court err as a matter of law in ruling that the Default Judgment against Mr. Thompson did not preclude the remaining Defendants from litigating the same issue that had already been determined by the District Court in the Default Judgment?

B. Alternatively, did the District Court err as a matter of law when it found Thompson was a permissive driver?

1. Did the District Court err in finding as a matter of law that Lowell Thompson had "expressed" permission from Tananda Bramlette to use the Toyota Celica at the time of the accident?

2. Did the District Court err in finding as a matter of law that Lowell Thompson had "implied" permission from Tananda Bramlette to use the Toyota Celica at the time of the accident?

III.

STANDARD OF REVIEW

In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. *Rule 52(a), I.R.C.P.* On appeal, the Idaho Supreme Court will not set aside findings of fact, unless they are clearly erroneous. *Id.; Trees v. Kersey*, 138 Idaho 3, 56 P.3d 765, 768 (2002). This Court also

gives due regard to the district judge's special opportunity to judge the credibility of witnesses who personally appeared before the judge. *Id.* However, unlike the Court's review of the district judge's findings of fact, the Court exercises free review over the district judge's conclusions of law. *Id.*

Whether claim preclusion or issue preclusion bars relitigation between the same parties to an earlier litigation is a question of law upon which this Court exercises free review. *Ticor Title Co.*, 144 Idaho 119, 122, 157 P.3d 613 (2007).

IV.

IMPUTED NEGLIGENCE

Imputed negligence claims against an owner of a vehicle apply if the negligent driver was operating a vehicle with the expressed or implied permission of the owner. *See, I.C. §49-2417.* That statute provides in part as follows:

> Every owner of a motor vehicle is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of his motor vehicle, in the business of the owner or otherwise, by any person using or operating the vehicle with the permission, expressed or implied, of the owner, and the negligence of the person shall be imputed to the owner for all purposes of civil damages.

I.C. §49-2417(1). Implied in this statute is that the required permission, whether expressed or implied, be applicable at the time of the negligent operation of the vehicle.[10] In fact, the District

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[10] Consistent with this statutory language is the definition of "Covered Person" in the insurance policy, which requires that the person use the vehicle "within the scope of the permission granted." *(Tr., p.22.)* Insurance companies have the right to limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy. *Barton v. U.S. Agencies Casualty Insurance Company*, 948 So.2d 1267 (La.App.2Cir. 2007). Where the policy language is clear and unambiguous, coverage must be determined in

Court's conclusion was that Mr. Thompson had such permission "at the time of the accident." *(Tr., p.197.)* The District Court's Trial Decision contains findings of fact, an analysis of permissive use law, and a conclusion that Lowell Thompson was driving the Toyota Celica at the time of the accident with Tananda Bramlette's permission. *(Tr., pp.192-198.)* Because the District Court did not specify whether Mr. Thompson had expressed versus implied permission, an analysis of both are presented herein.

V.

ARGUMENT

A. The January 3, 2007 Default Judgment, which established that Mr. Thompson did not have permission, expressed or implied, to drive the vehicle, should have precluded Defendants/Appellees from re-litigating the issue, and therefore, the District Court's conflicting Trial Decision should not be sustained on appeal.

On January 3, 2007, the District Court entered a Default Judgment, which indicated in part as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:
> a. Defendant Lowell Thompson did not have permission, express or implied, to drive the vehicle, and, as such, the Policy does not require Oregon Mutual to defend, indemnify or otherwise provide coverage for Defendant Lowell Thompson for all claims arising out off the January 21, 2006 accident;

The following language offered by Appellant in its proposed Default Judgment was crossed out and not approved by the District Court:

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accordance with the plain meaning of the words used. *National Union Fire Insurance Company of Pittsburgh, P.A. v. Dixon*, 141 Idaho 537, 112 P.3d 825, 828 (2005), *quoting Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 912 P.2d 119 (1996).

> b. Defendant Chris Kiser does not have any claims against insured Dale Bramlette, Kelly Bramlette, and Tananda Bramlette because Defendant Lowell Thompson did not have permission, express or implied, to drive the vehicle.

The Court's decision to limit the legal effect of the Default Judgment to Thompson became the law of the case. As a result of the Default Judgment, the issue of *res judicata* was addressed during the summary judgment proceedings, and the District Court ruled in part as follows:

> Farm Bureau never had the opportunity to fully litigate the issue of whether Mr. Thompson was a covered driver under the Policy. Accordingly, the Court is unwilling to hold the default judgment to preclude Farm Bureau from presenting fully its case. Thus, the Court, in its discretion, finds that Farm Bureau is not collaterally estopped from raising the issue of Mr. Thompson's coverage.

(R.p.143,L.13-17.) The District Court relied in part on *Pocatello Industrial Park Co., v. Steel West, Inc.*, 101 Idaho 783, 621 P.2d 399 (1980), for the proposition that "[c]ollateral estoppel (issue preclusion) is only applicable where specific issues actually have been litigated and decided." *(R., p.143.)*

On August 26, 2008, this Court provided clarification with respect to default judgments and the application of *res judicata* (which covers both claim preclusion and issue preclusion) in *Waller v. State of Idaho*, Docket No. 33831 (Idaho Aug. 26, 2008). In *Waller*, the State filed an action against Waller to establish his child support obligations, and a default judgment was entered against him on January 17, 1995. *Waller, supra, slip op. at 2.* Pursuant to the default judgment, Waller was ordered to reimburse the State for public assistance benefits previously provided on behalf of the child and to make monthly child support payments terminating when the child reached majority.

(Id.) In 2004, Waller filed for divorce and the district court entered a divorce decree which found that Waller was not the biological father of the child, and that Waller "has no financial responsibility regarding said minor child, past, present, or future, and that he is relieved from any child support or child support arrearage." *(Id.)* Waller filed a motion to set aside the default judgment, but the district court held that the motion was untimely pursuant to Rule 60(b), I.R.C.P. *(Id.)* Waller then filed suit seeking an order that his child support obligations be removed. The State moved to dismiss Waller's Complaint on the basis that his claim was barred by the doctrine of *res judicata*, and the district court agreed. *(Id., pp.2-3.)*

On appeal, this Court pointed out that the general rule is that once a judgment is entered it is *res judicata* with respect to all issues which were or could have been litigated. *(Id., p.3.)* The Court identified the following five factors which are required for collateral estoppel to bar relitigation of an issue decided in an earlier proceeding:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

(Id., pp.4-5.) The Court further held that absent fraud or collusion, the principle of *res judicata* applies equally in cases of default judgment. *(Id., p.5.)* Because the above-quoted elements were met, the Court affirmed the district court ruling that the default judgment precluded Waller from relitigating the issue of paternity. *(Id., p.6.)*

Upon entry of the default judgment, the record in the present case likewise established the required elements to apply collateral estoppel to bar Mr. Kiser and his insurers from relitigating the issue of Mr. Thompson's permissive use of the vehicle. Defendants/Appellees had a full and fair opportunity to object to or move to set aside the default judgment within 6 months pursuant to Rule 60(b), I.R.C.P., but they chose not to do so. The District Court's decision that Mr. Thompson was not a permissive user of the vehicle was the exact same issue at the subsequent trial. A judgment was entered, and Defendants/Appellees were parties to the proceedings at the time of the default judgment. Thus, the District Court erred in ruling that Defendants/Appellees were not collaterally estopped from litigating an issue that had already been determined by the court.

In its February 26, 2008 Trial Decision, the District Court concluded that "at the time of the accident Lowell was driving with the permission of co-owner Tananda Bramlette." *(R., p.197.)* The District Court subsequently entered a Judgment on April 9, 2008, which indicated in part as follows:

> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that at the time of the accident Lowell was driving with the permission of co-owner Tananda Bramlette ...

(R., p.199-200.) The Judgment of April 9, 2008 is obviously in direct conflict with the previously ordered Default Judgment. Thus, the Trial Decision of the District Court cannot be affirmed.

Affirming the Trial Decision would create confusion with respect to any subsequent judgment obtained by Mr. Kiser in his pending litigation against Mr. Thompson, including any subsequent efforts by Mr. Kiser to collect on such judgment from Oregon Mutual. In addition, such a decision by this Court could arguably be viewed as a setting aside of the Default Judgment,

contrary to the time limitations set forth in Rule 60(b), I.R.C.P. *See also, Idaho Power Company v. Idaho Public Utilities Commission*, 99 Idaho 374, 582 P.2d 720, 727 (1978)("A judgment or order based on inconsistent material findings of fact should not be sustained on appeal.")

As set forth in Sections V B(1) and (2) below, Oregon Mutual submits that the Trial Decision of the District Court should also be reversed on the grounds that the District Court erred in concluding, after it entered judgment against Mr. Thompson, that Mr. Thompson had expressed or implied permission to use the vehicle at the time of the accident.

B. Alternatively, the Court erred as a matter of law when it found Thompson was a permissive driver.

In its Trial Decision, the District Court made "Findings of Fact" which are not contested for purposes of the appeal. *(R., pp.193-194.)* The "Statement of Facts" set forth in Section I(C) above, are not inconsistent with the District Court's Findings of Fact, but rather, supplement such facts and allow this Court to put all of the pertinent facts into perspective in considering the legal issues on appeal. Thus, Oregon Mutual is not challenging the District Court's findings of fact on appeal. Instead, Oregon Mutual asserts that the District Court erred in its application of such facts to Idaho's governing law on permissive use.

The conclusion of the District Court was that "at the time of the accident, Lowell was driving with the permission of co-owner Tananda Bramlette." *(R., p.197.)* The District Court provided no explanation as to whether Mr. Thompson had "expressed" permission, or whether he had "implied" permission at the time of the accident. Further, the District Court failed to consider, and failed to

conduct any analysis as to the scope of any such permission, to support its conclusion that Mr. Thompson had permission to drive "at the time of the accident."[11] It is for these reasons that the District Court's ultimate conclusion must be reversed.

1. The District Court erred to the extent that it found as a matter of law that Lowell Thompson had "expressed" permission from Tananda to use the Toyota Celica at the time of the accident.

An analysis of the witness testimony in this case is important in considering whether Mr. Thompson had expressed permission as contemplated by the governing law. In fact, this Court must review whether Thompson had permission from Tananda to use the vehicle at all, before considering whether he had expressed permission to use the vehicle "at the time of the accident." This analysis is necessary because the District Court failed to make findings on the issue of implied versus expressed permission or on the issue of the scope of the permission.

The factual record demonstrates that both of Tananda's parents, Kelly and Dale Bramlette, made it clear to Mr. Thompson that he was not to be driving the vehicle. *(Tr., pp.11-13,25,26; R., p.205, deposition of Thompson, pp.11,12,43,33.)* Further, the testimony of Tananda and Mr. Thompson is consistent with respect to Mr. Thompson's lack of authority to drive the vehicle from the tire center to Tananda's workplace on the date of the accident. *(Tr., p.66; R., p.205, deposition of Thompson, pp.10,42,43,52.)* It is at this point that the testimony of Tanada and Mr. Thompson significantly diverges. According to Tananda, she never spoke with Mr. Thompson again until after

[11] The District Court's Trial Decision does not set forth specific "Conclusions of Law," as required by Rule 52(a), I.R.C.P.

the accident. *(Tr., pp.42,43,56,66,95,96,111.)* According to Mr. Thompson, he drove the vehicle to Tananda's workplace and she told him to go down the street to get gas and then come right back. *(R., p.205, deposition of Thompson, pp.12-13.)* Thus, if Tananda's trial testimony is believed, Mr. Thompson did not have expressed permission to drive the vehicle at all on the date of the accident. If Mr. Thompson's deposition testimony is believed, he had expressed permission to drive the vehicle only down the street and back, for purposes of putting gas in the vehicle.[12]

The District Court erred when it ended its analysis at this point. In fact, the critical determination is whether or not Mr. Thompson had expressed permission to use the vehicle "at the time of the accident." *(Tr., p.197,L.25.)* In other words, assuming Mr. Thompson's version of the events preceding the accident are accurate, the scope of such expressed permission is the key issue in this case. Factually, it is undisputed that Mr. Thompson exceeded the scope of any expressed permission that was given to him by Tananda to use the vehicle on the date of the accident. According to Mr. Thompson, Tananda was adamant that he was to "go right down the street and put some gas in it and come right back." *(R., p.205, deposition of Thompson, pp.12-13.)* Instead of complying with that expressed permission, Mr. Thompson decided that he was going to drive approximately one hour away to Sand Hollow for his own personal reasons. *(Id., pp.12,47,48,49.)*

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[12] As an aside, it should be noted that the District Court did not have the special opportunity to judge the credibility of Mr. Thompson because he failed to appear at trial. However, despite the fact that Mr. Thompson became intoxicated while drinking beer at the tire center on the date of the accident, the District Court chose to believe his recollection of the events preceding the accident, during his intoxicated state of mind, rather than Tananda's in court testimony.

Mr. Thompson admitted that he did not follow Tananda's instructions to get gas and return, and that he "made a stupid choice in not doing what she told me to do." *(Id., pp.48,52.)* No matter whose testimony is believed, it is clear that Mr. Thompson did not have expressed permission to drive the vehicle "at the time of the accident."

In *Farm Bureau Mutual Insurance Company of Idaho v. Hmelevsky*, 97 Idaho 46, 539 P.2d 598 (1975), the Idaho Supreme Court referenced three rules concerning the scope of permission, or deviation from an expressed permission: (1) the "strict" or "conversion" rule, i.e. any deviation from the scope of the permission given ends coverage; (2) the "minor deviation" rule, i.e. a minor deviation from the scope of the initial permission does not end coverage, but a major deviation does; and (3) the "liberal" or "initial permission" rule, i.e. the permittee is covered although the use is beyond the scope of the initial permission unless the use so far exceeds the initial permission that the permittee is akin to a thief or converter. *(Id., at 601.)*

Considering the facts of the present case, it is apparent that only the application of the "initial permission" rule could potentially result in a finding that Mr. Thompson had expressed permission at the time of the accident. However, this Court declined to adopt any of the above-cited rules, stating that "none can be adopted for universal application in this state." *(Id.)* The *Hmelevsky* Court also noted that interpreting deviation from express permission in an employer-employee context[13]

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[13] In terms of scope of employment, courts typically determine whether the employee was on a frolic versus a detour. The latter is a deviation that is sufficiently related to the employment to fall within its scope, while the former is the pursuit of the employee's personal business as a substantial deviation from or an abandonment of the employment. *O'shea v. Welch*, 350 F.3d

is distinguishable from what might be appropriate in an intra-family situation. *(Id., at 602.)* The facts and analysis in *Hmelevsky* are limited to a family context situation, and therefore, the holding by that Court is of little assistance in the case at bar, as Tananda and Mr. Thompson are not blood related, knew each other for only three and one-half months prior to the accident, and have never been married.[14]

In concluding that Tananda gave Mr. Thompson permission to drive the vehicle at the time of the accident, the District Court erred as a matter of law because it did not analyze the scope of the expressed permission granted. Instead, the decision of the District Court appears to be primarily based upon Tananda's admission that some time after the accident, she gave Mr. Thompson the vehicle's proof of insurance card. With respect to this testimony, the District Court commented:

> By doing this, Tananda implied to the court that the vehicle was insured while Lowell was driving it and that the damages suffered by the victim, Chris Kiser, would be paid by the insurance. By now testifying at court that Lowell did not have permission to drive the Celica on the day of the accident, Tananda is now taking an inconsistent position that could constitute a fraud upon the court.

1101, 1105 (10th Cir. 2003); *see also, State Farm Mutual Automobile Insurance Company v. Logan*, 444 F.Supp.2d 622 (Dist.S.C. 2006)(coverage denied under omnibus clause where permittee deviated from grant of permission by using vehicle for personal use).

[14] The *Hmelevsky* decision is further distinguishable in that at the time of the accident the permittee was driving with the expressed permission of the vehicle owners' daughter, who was being driven home by the permittee, and the permittee could therefore be considered to be serving a purpose of the daughter and arguably a purpose of her parents. *Hmelevsky, supra, at 603.* In the present case, Mr. Thompson was serving only his own purpose at the time of the accident, i.e. to check on the status of his vehicle that had been left on the side of the road in Sand Hollow.

(Tr., p.197,L.7-12.) In other words, the District Court concluded that Tananda's act of giving Mr. Thompson her insurance card amounted to an admission that Mr. Thompson had permission to use the vehicle at the time of the accident. However, when asked why she gave the insurance card to Mr. Thompson, Tananda stated, "[b]ecause I had insurance on the vehicle."[15] *(Tr., p.76.)* The District Court's statement is a huge jump – unwarranted by the record.

Given that the District Court chose to believe the deposition testimony of Mr. Thompson on the issue of expressed permission, the proper focus at that point should have been on the scope of that permission. As to the expressed permission granted by Tananda, Mr. Thompson testified in part as follows:

> Q. So, Mr. Thompson, after you went to put gas in Tananda's vehicle, was it your understanding then that you were going to come back and pick Tananda up from work on that occasion?
>
> A. That was what she had instructed me to do.

(R., p.205, deposition of Thompson, p.23.) Mr. Thompson made it abundantly clear on several occasions that the scope of Tananda's expressed permission to use the vehicle was limited to going down the street to get gas. *(Id., pp.12,13,48,52.)* There is nothing in the record to suggest anything other than the fact that Mr. Thompson clearly exceeded the scope of any expressed permission to use the vehicle, and that he did not have expressed permission to use the vehicle "at the time of the

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[15] The fact that Tananda apparently wanted to help her boyfriend after the fact, in connection with a citation for driving without proof of insurance, does not somehow negate her testimony and the testimony of Mr. Thompson concerning permission to use the vehicle and the scope of any expressed permission.

accident." Had Mr. Thompson decided at that point to drive Tananda's vehicle to Florida, it could not be said that he had Tananda's expressed permission to do so. Likewise, his decision to drive the vehicle to Sand Hollow, for his own personal reasons, cannot be said to have been done with Tananda's expressed permission. Thus, to the extent that the District Court concluded that Mr. Thompson had Tananda's expressed permission to drive the vehicle at the time of the accident, as he was heading out to Sand Hollow, the decision must be reversed.

2. The District Court erred as a matter of law to the extent that it found that Lowell Thompson had "implied" permission from Tananda to use the Toyota Celica at the time of the accident.

Notwithstanding the absence of any expressed permission at the time of the accident in this case, I.C. §49-2417 will also apply if Mr. Thompson had implied permission from Tananda to use the vehicle at the time of the accident. Implied permission is actual permission circumstantially proven. *Allstate Insurance Company v. Lupoli*, 2001 WL 34047101, at p.5 (D.Or. 2001). The heart of the concept is whether or not the use by the permittee was contrary to the intent or will of the alleged permitter. *(Id.)* With respect to implied permission, the Idaho Supreme Court has stated that there is no formula which will aid the courts in deciding whether a motor vehicle was operated with the implied permission or consent of the owner. *Steele v. Nagel*, 89 Idaho 522, 406 P.2d 805, 809 (1965). However, prior decisions concerning implied permission focus on the relationship of the driver and the owner and on the owner's conduct in relationship to the driver's access to the vehicle. *Allied Group Insurance Company v. Allstate Insurance Company*, 123 Idaho 733, 852 P.2d 485,

487-488 (1993)(*citations omitted).* Greater inferences of permission are granted from lesser evidence if the owner and driver are related[16] or are employer-employee. The Idaho Supreme Court adopted the following explanation provided by a California court dealing with the issue of implied permission:

> Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator is of paramount importance. Where, for example, the parties are related by blood, or marriage, or where the relationship between the owner and the operator is that of principal and agent, weaker direct evidence w ill support a finding of such use than where the parties are only acquaintances.

Steele, supra, at 809-810, *quoting Elkington v. California State Auto. Ass'n. Int. Ins. Bur.*, 173 Cal.App.2d 338, 343 P.2d 396 (1959).

Idaho case law also provides instruction on factors to consider which may imply permissive use, particularly in cases involving parties who are not parent-child or employer-employee. Those factors include (1) whether the driver had been given permission to drive the vehicle in the past; (2) whether the driver had easy access to the keys; (3) whether the owner checked the gas, oil, or mileage to see whether the vehicle was being used without permission; (4) whether the driver had

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[16] With respect to a parent-child situation, the rationale for allowing weaker evidence to establish implied permission was summarized as follows:

> If parents are indifferent to their parental obligations in this regard, their children are apt to accept such indifference as tacit permission to do acts which should, under the circumstances, have been controlled or forbidden. Juries are entitled to draw the same inference.

Eckels v. Johnson, 96 Idaho 264, 526 P.2d 1100, 1103 (1974).

been instructed not to drive the vehicle; (5) what action the owner took when the car was missing; and (6) whether the driver had express permission to use another vehicle belonging to the owner. *Allied, supra,* at 738; *see also, Eckels, supra,* at 1103-1104 (1974).

In the present case, the District Court concluded that Tananda gave Mr. Thompson permission to drive the vehicle at the time of the accident, which implies that Tananda's intent, based on circumstantial evidence, was that Mr. Thompson be permitted to drive the vehicle at the time of the accident. This conclusion is unsupported by the evidence and should be reversed. First, Mr. Thompson testified that he had never driven a vehicle owned by Tananda prior to the date of the accident. *(R., p.205, deposition of Thompson, pp.10,36,37.)* Although Tananda testified that Mr. Thompson had driven her vehicle in the past, such permission was granted only on two occasions when she was not feeling well enough to drive, and she was present as a passenger on both such occasions. *(Tr., pp.39-42.)* Second, Tananda left her keys in the possession of a mechanic at Al Hall's Tire Center, and made arrangements with someone other than Mr. Thompson to pick her up at work after the repairs had been completed. *(Tr., pp.53,56,57,65.)* Third, Mr. Thompson had been instructed by co-owner Kelly Bramlette that he was not to drive the vehicle. *(Tr., pp.11-13,25,26.)* Fourth, Mr. Thompson knew through Tananda's father, Dale Bramlette, that he was not to drive the vehicle. *(R., p.205, deposition of Thompson, pp.11,12,43,44.)* Fifth, Mr. Thompson knew that he was not supposed to be driving the vehicle because he did not have a valid driver's license. *(Id.)* Finally, and perhaps the most significant factor in this case with respect to the analysis of implied

permission, is the fact that Tananda either (1) had no knowledge that Mr. Thompson had obtained the keys to her vehicle from the mechanic at the tire center, or (2) gave specific instructions to Mr. Thompson to go down the street to get gas and come right back. Under either scenario, it cannot be implied that Mr. Thompson had permission to drive the vehicle one hour away to Sand Hollow for his own personal benefit. Such a use of her vehicle was clearly one that was contrary to Tananda's intent. Thus, at the time of the accident, Mr. Thompson did not have implied permission to use Tananda's vehicle.

VI.

CONCLUSION

For the foregoing reasons, Oregon Mutual respectfully requests that this Court reverse the Trial Decision of the District Court, and find that Lowell Thompson did not have expressed or implied permission to use Kelly and Tananda Bramlette's vehicle at the time of the subject accident.

DATED this 2nd day of September, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September, 2008, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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